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CASES

DECIDED IN THE

DISTRICT AND CIRCUIT COURT

OF

THE UNITED STATES

FOR THE PENNSYLVANIA DISTRICT,

AND ALSO

A CASE DECIDED IN THE DISTRICT COURT OF MASSACHUSETTS,

RELATIVE TO THE

EMPLOYMENT OF BRITISH LICENCES

ON BOARD OF

VESSELS OF THE UNITED STATES.

PHILADELPHIA:

PUBLISHED BY REDWOOD FISHER,

NO. 30, SOUTH FOURTH-STREET.

.....

1813.

CASES, &c.

United States for the use of the owner, officers, and crew of the privateer schooner Atlas, Moffat, commander.
v.
Brig Tulip and cargo, Funk, master.

PRIZE COURT.

Admiralty side of the District Court of the United States, in and for the Pennsylvania District.

This is a case of an American vessel, clearly documented as such, belonging to William Shaw, a naturalized citizen of New-York. The property in the vessel is not disputed; nor does there appear any objection to the title of William Shaw, to the brig captured. She was taken, as prize, by the Atlas, Moffat, duly commissioned as a privateer, on the 15th of July last, in her course from New-York for Lisbon.

It appears, that great part of her lading was taken on board previously to the declaration of war. It was

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would have been entitled.* Although Mr. Foster was not, at the time, in a capacity to perform his official functions, as they related to the United States; yet, his acts, as they regarded his own government, and the officers of its navy, were binding; and, as to them, official. He was the minister of that government returning from an embassy. His powers had, indeed, ceased, as to the government to which he had been sent; yet they were not extinguished by his own country, as regarded its interests and concerns. However valid the contract stated, and the passport were, as connected with his own government, they were, as to us, illegal and highly unjustifiable. The passport was accepted, by the owner of the brig, after the passing of the act, entitled, "*An act to prohibit American vessels from proceeding to, or trading with the enemies of the United States, and for other purposes*:" passed the 6th July last. The law could not have been known to the collector of New-York on the 8th; when he cleared out the vessel and cargo, for Lisbon. She did not leave the Hook till the 12th. But whether it was or was not known on board of the Tulip, before her departure from the Hook, does not appear. Some despatches and letters sent on board by Mr. Foster, to the care of James Cleeland, the messenger (a Trinity House pilot, on his return home from New-

* 1 Black. Com. 259 Note. Donath. v. Insurance Company, N. A. 4 Dallas, 463.

York) were directed for Lisbon, which he was desired to deliver to the captain of the Tulip; though other letters sent under his charge, at the same time, were directed to be put in the post-office in England.

Only the papers necessary to prove American character in the vessel, were shown to the captors, in the first instance. No papers or proofs, ascertaining the cargo to be American property, were then, or at any time since, shown to the captors, or exhibited to this court. The supercargo, Braine, swears, that he had verbal orders for selling the vessel and cargo, at Lisbon, for account of Shaw, of New-York; to whom, as he understood and believes, both belong. The master, Funk, swears, that he signed bill or bills of lading "to order;" and also declares his understanding and belief, that the property, in both vessel and cargo, belongs to William Shaw of New-York. As to the suspicion that this ownership was one *in transitu*, (induced by the circumstance of the bills of lading being "to order") there does not appear any other foundation for it; unless it can be laid in the papers herein after stated. No bill of lading, except the one hereafter mentioned, was found among the papers delivered into this court, by the captors, but an affidavit of the captain, Funk, was offered, to prove, that one had been delivered, by the captain of the Tulip, to the lieutenant of the Atlas. The court did not think this regular, in the stage of the

cause in which it was offered; nor was it clear of the objection to it, it being sworn to by a witness who had been examined on the standing interrogatories, before an order for further proof. A *ruse de guerre* was practised by the captain of the Atlas, which was then and had been, under British colours, and called the privateer Pitt of Bermudas. He said "the Tulip was a good prize; and he should send her into Halifax." At this stage of the business, the passport from Mr. Foster was produced by the supercargo; together with the following document.

An envelope (for there was no epistolary communication) was delivered with the passport, and not before, superscribed "to Messrs. Shaw and Carroll, merchants, Dublin;" and containing an invoice and bill of lading of the cargo, both dated the 17th of June, 1812. The invoice is without marks or numbers; it amounts in value to 11,839 dollars, 6 cents; it includes an item for commissions at five per cent. making 591 dollars, and 95 cents; and it is headed "invoice of merchandise, shipped on board the brig Tulip, James Funk, master, for Lisbon, per order, and for account and risque of Messrs. Shaw and Carroll, merchants, Dublin." The bill of lading is signed by James Funk; it states the cargo to be shipped by William Shaw; it declares the cargo to be deliverable to the order of the shipper, upon payment of 4000 dollars freight; and an endorsement, by William Shaw, directs the captain to "deliver

the within contents to the order of Messrs. Shaw and Carroll, of Dublin." This document with its enclosure, the character of Cleeland as a messenger, and the despatches entrusted to him by Mr. Foster, were all concealed in the first instance, from the knowledge of the captor. Even at the time of the examination of the witnesses in *preparatoria*, it appeared, that six or seven letters directed for Lisbon, had also been concealed during the chase. They were never delivered up, nor mentioned, until such examination, when we find, unaccountably, that those letters do not relate to the Tulip, or her cargo; and that neither in them nor any other paper on board, (though the ship, as well as the cargo, were to be sold by him) is the supercargo, who was going a perfect stranger to Lisbon, introduced, recommended, or named!

The messenger and despatches were captured on board of the Tulip. But the supercargo and the captain do not precisely agree, as to the plan originally contemplated for disposing of them. It must, however, be inferred, from what both have said, that, even if the Tulip was forbidden, by her owner, to enter or touch at any English port, for the purpose of landing the messenger with the despatches, she was to put them on board of any vessel proceeding to England, which she might casually meet; and if, in her direct course for Lisbon, she did not meet with a vessel proceeding for England, she was to

sail to the Lands End (many degrees of latitude and longitude out of her direct course) and lie off and on there, until she found a vessel going into port.

The envelope directed to Shaw and Carroll of Dublin, contained, most assuredly, the only papers exhibited in relation to the cargo. It is alleged by the claimant, that those papers were to be produced only in case the vessel should be carried into a British port. If the envelope and its contents, had been at their date (before the cargo, let it be noted, was all shipped) calculated as a mere cover; it was an unnecessary measure after the passport, which would supersede all necessity for producing these papers in a British port. American papers were, then, the only documents the cargo required; if it were *bona fide* American property.

I take no notice of the contents of a paper said to be signed by the captain of the Tulip, Cleeland, and Braine, after the capture. It cannot have the authority of a paper found on board at the time of capture; it is not proved on oath to have been signed; nor could it have been competent to prove the facts therein stated. It is contradicted, in its principal allegation, by the oaths of Braine and Funk; and could only be used to discredit their testimony.

Some animadversion has been made, by the advocate for the captors, on a short letter from Mr. Sampayo at New-York, directed to Mr. Sampayo at Lisbon, found on board the Tulip. There is no intrinsic evidence in this letter, that it relates to that

vessel or her cargo. The external circumstances alleged to be grounds of suspicion, are not proved or judicially known to the court.

The claim of William Shaw, and an affidavit annexed, state, that he is a naturalized American citizen, resident in New-York, as a merchant, since 1795. That the lading of the brig (whereof he is the sole owner, as well as of the cargo) commenced on the 10th of June, and she was destined for Lisbon and no other port, and he had not since changed her destination, or that of her cargo. The supercargo had express orders to proceed to Lisbon; and not to touch on any account, at any port, or place, in Great Britain or Ireland. That, for the purpose of protecting the vessel and cargo from British capture, and for no other purpose, on her voyage to Lisbon, he received, from H. Barclay, son of the British consul, "a letter from Augustus J. Foster, lately the minister plenipotentiary of Great Britain near the United States; intended as a protection from British capture; and agreed to take on board one or two passengers; and to land him or them in England; provided the deponents vessel, either in the course of the voyage, or off the Lands End, whither she was to go in case of necessity, should find a vessel bound in to England." If no opportunity (a vessel going in) occurred off the Lands End, the Tulip was to proceed directly for Lisbon; with the passenger or passengers. He states, that his so pro-

ceeding to Lisbon had it been necessary, was not objected to, by Mr. Barclay, the British consul, on condition of his "forwarding the said passenger or passengers from thence to England, at his own expence." He states, that the letter to Shaw and Carroll, and the endorsed bill of lading, were intended to enable them to protect the property if carried in to a British port. "But the said deponent, at the same time, instructed the said supercargo, not to show either the said letter, or bill of lading, until the said brig and cargo should be actually captured, and carried in by a British vessel." That he was ignorant that the Tulip had on board any letters for England or Ireland (other than those enumerated) "except such as the said Augustus J. Foster should deliver to the said passenger or passengers, at New-York." He declares his ignorance of any letters being put on board for Lisbon; and if any were so put on board, even by Mr. Foster, they so were without his consent or privity. He repeats, that the sole destination was for Lisbon; where the supercargo was instructed to sell both vessel and cargo; and to invest the proceeds in bills of exchange, for the deponent's account. That he insured the brig and cargo for the Lisbon voyage alone. That neither the British government, nor any subject of that government, or any person inhabiting within the territories thereof, nor their factors nor agents, had or now have, any right or interest in the brig, or her cargo.

A great number of letters for England, were found on board the Tulip, after her capture; but they did not relate to her, or her cargo.

The passport contains, in itself, ample evidence of the most essential fact, on which I shall found my opinion. This document is sufficient, in my view of the subject, without travelling into the contents of the despatches themselves, whether innocent or noxious. Much less is it necessary, minutely to attend to the speculations of the claimant's advocates; who, without having seen them, claim the right of contradicting (as decorously as such a circumstance will, with any tolerable appearance admit) my statement. Thus calculating, ineffectually here, to induce the spreading the despatches on the minutes; or excluding them entirely from the notice of the court. These speculations extend to the groundless, and, considering the character of the minister, and the circumstances of the case, highly improbable supposition—that the packet might contain nothing inimical or noxious. Probably, as is surmised, it is mere blank paper! to give a colour to a collusion between the claimant and minister, for covering this cargo. Not a very favourable aspect in which to place either the minister or their client! or even the ownership of the cargo. But I should not be so exacerbated by the rage of war, as to presume the minister capable of such conduct; especially in an object so

small; if I did not possess the means of proving the contrary.*

The minister declares in his passport;—"it becomes indispensably necessary" (and necessity is too often, state morality) "to forward despatches to his majesty's secretaries of state." Can any reasonable mind seriously presume, that these despatches were not, to them important; and, of course, to us, hostile and noxious? Is it within the compass of the most ardent credulity (I say not credibility) to believe, that the minister's envelope enclosed entirely innocent matter? or—what is more fanciful—blank paper? and that in charge of a messenger! Would a public minister prostitute his own, and the official characters of "his majesties secretaries of state," for the petty and sole purpose of covering or protecting, a cargo—trifling indeed, to induce the sacrifice? And that, when the same object, for an innocent voyage to Lisbon, could have been effected, without such dangerous and unlawful pretexts?

I shall not, extensively, indulge myself in controversy about the legality (common law legality applied in a prize court!) or the "novelty" of the mode I took, from necessity, to certify an extract of part of the contents of a despatch; and to announce the import of the subjects of it. I am not myself prepared, confidently to declare, what mode is the most

*See 6 Rob. Am. Ed. 465.

proper. One of the advocates, who is greatly dissatisfied with my mode, will suggest, or tolerate no other. He will have no middle course. The whole must be developed, or totally excluded. Another would submit to the judgment and certificate of the secretary of state, both as to state policy, and noxious character: but inhibits the judge—although the law expressly assigns to him the receipt of, and power over the papers—from all discretion, or instrumentality, in this part of the case. Now (however mistaken I may have been as to my mode of placing the facts among the exhibits) it would seem to me, that, in some way or other, the judge who is to determine the cause, should have an opportunity of seeing and deciding whether or not, any, or what part of the despatches were indispensably necessary to the justice of the case; and maugre this interdiction of the learned advocate, and throw myself out of the question, he seems to be exactly the character, who ought to be best qualified to form a just opinion on the subject; either of relevancy or necessity of developement. No doubt, should the secretary of state, hereafter, certify, in the manner this worthy advocate would approve; we should hear, from some other, a variety of objections, which it does not become me to mention, or surmise. It has, too frequently, fallen to my lot, through a period of more than 20 years past, to take the first step on to us, new, and often embarrassing points. It is

not my habit to be overweeningly attached to my own modes, or opinions. But it is my habit to decide, and to act as it appears to me right at the time; and that as promptly as the case demands; leaving the dissatisfied party to his remedy in a superior tribunal. There is a protest to the extract from the despatch, and my certificate of its import. This was much desired by me, and I am gratified in the hope, that a superior tribunal will give explicit instructions in what manner I shall hereafter proceed, if similar circumstances (not likely to be frequent) should again occur. Whether this mode or any other, be settled by those to whom I look for correction of my errors, is to me immaterial. Common law principles, and rules of evidence cannot be applied in a prize court. Its proceedings are totally different from those of any other court. Proofs and evidence are from necessity and the nature and exigencies of cases here permitted; which would be at once rejected, not only in courts of common law, but on the instance side of this, or any other admiralty court.

It is only on account of the novelty of this part of the cause, in this country, and by no means induced by any thing relating to myself, that I add to the foregoing observations. My leading object is, to obtain a direction for future government under such circumstances.

I abstracted, from the mass of papers delivered to me, the despatches of Mr. Foster, and sent them, with the seal of the envelope unbroken, through the law officer of the district (the usual organ of communication with the executive) to the secretary of state. This I did under my own view of its propriety; and without adverting, at the time, to the constant practice in other nations. In England and France, it is always customary. Those nations, unhappily for themselves and all the world, are the best acquainted with the horrible trade of warfare, having been, through ages with short intermissions engaged in it. Finally their bitter and endless collisions have involved us; and we have, in our new situation much to learn. Both have alternated friendship and enmity with us, at different periods of our national existence. But I do not, on the latter account, disregard all their established practice in prize proceedings. *Fas est et ab Hoste deceri.* In both England and France communications are, and have been through a long course of time, made by their executives or their ministers, to prize judicatories,* as well of the fact of captured despatches (always sent to some executive department) as of their tendency and import. Our act of congress directs, that all papers found on board a prize, shall be de-

* Marryot's Decisions, in 1776, 6, Rob. 444, Code de Prisis, 1778, page 705.

livered, on oath, to the district judge; as with him, and in the court in which he sits, all prize proceedings must originate. But the despatches, *in extenso*, are never, in any country, developed in prize courts. How this is to be regulated in our courts—let the supreme courts, or the legislature, direct. The secretary of state transmitted to the attorney of the district, not as proctor in this cause, but in his capacity of law officer of the district, an authenticated copy of the despatch from which I made the extract, and certified its import. It was accompanied by a request, that it might not be made public; unless I should be of opinion, that the justice of the case so indispensably demanded its publicity, as to overbalance the policy and interest of the government and nation. I was not of that opinion, but placed among the exhibits, the extract objected to, it being the only part in any wise directly relating to the cause. I would not require the whole to be spread on the record; not only because I did not deem it essentially necessary, but because I would not establish a precedent, which if followed, might in some future case (however it might be in this) involve and injure the interest of the nation, to which those of individuals must ever give way. The judiciary of this country, being a co-ordinate branch of the government, is peculiarly bound to be attentive to the safety of the nation, on such points; and more especially in courts whose jurisdiction rises out of,

and is employed exclusively in the incidents of war. If the superior court should deem the despatch, or the copy of it, essential in the cause, it is ready to be produced. As to the argument of the claimant's advocates, that they should have the opportunity of discussing its contents, showing its innocence, and refuting the imputation of noxious character;—I feel warranted in saying—that great national objects must prevail, over such minor considerations. Nor do I conceive the despatch (which, however, cannot but be believed to be calculated to serve the interests of the British government and not ours) of so much importance in this cause, as the example would be mischievous, on some future occasion. Our own citizens may easily escape any difficulties on this account, by avoiding all instrumentality in such business. Let it be remembered too, that the noxious quality of the despatch is only an aggravation of the offence; whereof the placing the vessel, for any unlawful purpose in the service of the enemy, is the gist and substance. True it is, as has been observed by the advocates for the claimant, that intelligence may be conveyed through a multitude of ordinary channels; but that going directly from or on plans suggested by a public functionary, especially if attended with the solemnity of a messenger, could not fail to be, in a ten fold ratio, regarded. It appears, in this case from Mr. Foster's passport, that ordinary means were not in plenty; for he declares "no

ordinary conveyance could be procured." It also appears, that he would have preferred such means; as he avers that the employment of this vessel arose from "an unpleasant necessity."

I am not inclined to say (but I give no opinion on any point, save that immediately before me) that a passport unaccompanied with unlawful conduct, protecting the vessel in this case, if the cargo be really American, from British cruisers, would have been as to us, cause of capture and condemnation; however it might have exposed her to the risk of being made prize of by other enemies of Great Britain. Passports from a belligerent to neutrals (or, possibly to our ships even now, when we have changed our neutral character) to proceed unmolested, from one lawful port to another, may not be considered as illegal; if not tainted with unlawful conduct or conditions. It is not unprecedented for a belligerent to exempt even enemy ships engaged in a particular trade, beneficial to such belligerent, from capture by its cruizers. It is yet lawful for us to trade with Portugal and Spain, with cargoes *bona fide* American property. If all our ships in this trade laden with cargoes belonging to our own citizens, were exempted from capture by the British, I do not now see, that we should have the right of condemning them as prizes to us. But when particular vessels are indulged with such exemptions, it creates suspicion, at least as to cargo. This has caused

much animadversion in this case and in all such cases, clear proof is required to repel the fraudulent appearance. Simulated papers are not, in themselves, causes of condemnation; though they throw the proof on the claimants; and carry with them strong suspicions of fraud. This vessel and cargo were insured, and should have been documented, as American property. It is on this score, strange that no papers as to cargo, but those sworn by the claimant to be simulated, should be found on board. If he was justified in covering, to delude the enemy, he certainly should have contemplated the risk of capture by us. *Incidit in Scyllam, cupiens evitare Charybdem.* The solitary bill of lading, and that not in possession of the supercargo, offered to be proved to have been delivered to the lieutenant of the Atlas by the captain of the Tulip, even if the proof had been admitted, seems but slender evidence of *bona fide* American property. The captain generally retains one of the bills of lading for his own purposes. This has no operation, as to proofs of property, one way or another.

I am not now necessarily bound to determine whether the law of the 6th July embraces this case, or subjects the person and property of the owner to its forfeitures and penalties. If they even are so subject, they are not exempted from the laws of nations, when those are violated. I cannot agree in the doctrine insisted on, "that the claimant is only amena-

ble to this law of our own country; and if that does not reach him, or his property, both are free from the operation of any other." It will be with more consideration than I think it necessary now to give the question, before I determine how far the prize jurisdiction, without special authority in penal acts of the legislature, applies to forfeitures accruing under our municipal laws. The law of the 6th July, only interdicts licenses to trade to a British port. It obliges vessels to give certain bonds, before clearance and departure. The Tulip was lawfully cleared; the law not being, nor could it be known to either the claimant or the collector, at New York, before the clearance was given.

As to questions of trade with enemies, I will meet them, when they come directly before me. Possibly I may have to decide such questions in chief, and I do not choose, incidentally, to give an opinion. Bynkershock (Duponceau's) 23, 4, clearly states—"But although trading with the enemy be not specially prohibited, yet it is forbidden by the mere operation of the laws of war." He had before said, that most nations forbid such trading, either in their declarations of war, or by special laws or edicts. I notice this merely to show, that in the opinion of this justly celebrated jurist, such municipal laws were only cumulative prohibitions, re-enactments or additions to the law of nations; which would have been competent without them. In this light, I con-

sider the law of the 6th July, in this case. Nor can I agree with the claimant's advocates, that a citizen, to certain intents, may not be considered and treated as an enemy. Municipal laws, it is true, may cumulatively, for offences against the law of war, operate personally and also on property within our territory. But both person and property are still subject to the laws of nations. The admiralty law operating in its proper tribunal, is peculiarly applicable to property within its jurisdiction; and when that is rightfully employed on subjects of prize, it is emphatically, a court of the law of nations, in whatever place or country it sits. The technical definition of "enemy," given by one of the advocates for the claimant, would do well for a philologist; but here it is more ingenious and learned than solid. A neutral violating his neutrality, is separated by his own misconduct from the character of his nation; and becomes individually an enemy. A citizen of a nation at war, lending himself or his property to the service of the enemy,* becomes *pro hac vice*, and his property (though it may not be really or nominally, enemies property) is subject to all the consequences. It is contrary to his allegiance, which is part of the law of nations; and there is no distinction, in this respect, between native and adopted citizens. He violates the obligations imposed on him by his allegiance

* See 4. Dallas. Appendix 3.

when he affords service or assistance to the enemy, in any unlawful case. Conveying intelligence is accounted the most mischievous and unlawful attribute and concomitant of trading with the enemy.* I should hold the opinions whereof my decision is the result, upon principle, if no decided case could be found. But see the case of the Hoop, 1 Rob. Am. Ed. 165; and particularly the note, 184, Duponceau's Bynkershock. 157, 8, Term. 561. 1 Term. Rep. 185. Sr. Leon. Jenkins. Introd. 86, 92. And also see Sir W. Scott's definition of "Despatches," and his reasoning as to the nature of them; 6 Rob. 465.

I know of no case of service to an enemy, acts of humanity excepted, which is not unlawful. Modern warfare permits (as it does not though practised) offices of civility, between enemies,† "*Les offices de civilite ne sont pas incompatible avec les devoirs de la guerre.*" But acts of benevolence and offices of civility, are very different from services which assist in the operations of war.

The foundation of my decree is; that this vessel was, at the time of capture, with the knowledge of, and under contract with the owner, undeniably, in the service of the enemy; carrying despatches of a public nature, sent under the charge of a messenger,

* 2 Rob. 69.

† Bynkershock 1. P. c. 12, p. 95.

from a British minister, to his government, during open and declared warfare, between this country and Great Britain and Ireland; in violation of the duty of allegiance in the owner. Whether the service in which she was engaged was to be performed, by actually going into a British port or by transhipping the messenger and despatches at sea, is in my contemplation of the subject, immaterial. For this reason, I have passed over, in the statement, the circumstance of the capacity of the British pilot Cleeland to place the vessel in a safe and convenient situation for landing himself and a servant of Mr. Foster's, who was on board, at an English port, or place. Neither the pilot, nor the servant, could have contemplated a passage to England by the way of Lisbon. Trading with an enemy at sea, is equally illegal, with so trading in port. Conveying intelligence, stands on the same principle, and subjects the vehicle employed, to capture as lawful prize. The cargo, if belonging to the owner of the vessel so employed, with his knowledge and by his express agreement, in committing the offence is confiscable *ex delicto.* "*Si sciverit, ipse est in dolo.*" And the "*Scienter*" of the owner in this case, is incontrovertibly proved. If it be enemies property, it is confiscable *ex re*, so that, in either case it appears to me to be lawful prize of war. On this view of the case, were I inclined to order further proof, on the

claim of American ownership, it would produce no favourable result.

I have been compelled by a long discussion, often embarrassed with matter not necessarily belonging to it, and too much protracted to dilate on this subject so much more than I intended, that I do not pointedly notice all the authorities which, I think, fully support my opinion. In the case of the Atalanta, 7 Rob. 440, much information, on the subject of unlawfully conveying public despatches, will be found. Every thing there said to condemn the conduct of a neutral, applies, with double force, against the act of a citizen, in such a case. The ground of decision in the case of the Atalanta is not laid in the obnoxious British doctrines of colonial trade; but, the importance of a colony to the mother country, is mentioned as an ingredient, to show the enormity and injurious tendency, of the offence. Nor is the judgment founded merely on the fraudulent conduct of the neutral; though that is also an ingredient; which, whatever there may be in this case of a similar nature, I have avoided introducing with any stress. The illegality and inimical conduct of the neutral in carrying enemy despatches, is by Sir W. Scott pointedly relied on.

A neutral may carry despatches from a minister resident in his country, be the nature of them what it may, to the ports of the belligerent in the country to which the minister belongs.

If the neutral is stopped on the high seas for search all he has to do, is to act candidly; and deliver the despatches to the enemy of the minister's government; which those who use such conveyances must expect.* But concealment and *mala fide* conduct, are taking part with the enemy, and subject the neutral to the penalties inflicted by the laws of nations. Very different is the case of a citizen, whose country changes its state of peace and neutrality, to that of war. No service afforded to an enemy, as to despatches, or other assistance, can be justified. Delivery of the despatches, on capture, without even an attempt to conceal them, does not purify the original act, which was illegal *ab initio* in the citizen; though it might have been otherwise in the case of the neutral.

If there be not a dicision directly to the point of this case, I hesitate not to apply old principles to new circumstances. I agree in the reasoning of Sir W. Scott, on this subject. Although all his opinions are not in unison with our sentiments (nor in some important instances, are those of English common law judges) it would be illiberal and uncandid, to deny him the meed of great talents, sound sense, and a thorough knowledge of the laws of nations. I do not follow his decisions or opinions, as binding authorities. But his decisions, are luminous guides,

* 6 Rob. 454.

where they are not warped by the executive edicts, or by the prejudices arising from inveterate state policy; which too often tarnish the character of the court in which he sits, and render it, when operated upon by them, no longer a tribunal governed by the laws of nations. He does not, however, stand alone, in supporting the principles which have directed my judgment.

I do not reject the fact of noxious despatches. They are not, it is true, spread on the minutes, communicated *in extenso* to the claimant's advocates, or proved in the way they deemed exclusively proper. Yet the tendency and character of them are sufficiently unfolded for all the purposes of justice. I rely on the unlawful service, incontrovertibly proved by the minister's passport; to the evidence whereof no objection has been, or can be made; as the principal ground of decision, though both grounds are, in my opinion, sufficiently tenable. The claimant's own acknowledgment, on oath, would be competent proof, did not the passport, on its face, bear ample testimony, of the fact of employment in enemies service.

If I am mistaken, in this new course, which the unhappy contest we are now commencing has thrown upon me; my errors either in form or substance, may be corrected, on appeal.

Much complaint has been made, as to the form of the libel—the deficiency of the interrogatories—

and conduct in the examination of witnesses. The libel I do not think objectionable, though it might have been in another form, as to the parties libellants. The interrogatories are sufficient to produce the facts necessary in the cause. The proceedings at the examinations *in preparatoria*, passed, for the most part, under my own observation. I saw nothing improper, or reprehensible. Experience will teach us what alterations, or additions are necessary, in or to any of the proceedings, and I shall always be ready, in future cases, to listen to her lessons; aided by the suggestions of the gentlemen of the bar; including, very desirably, the learned advocates for the present claimant.

As I now conceive both the facts and the law of this case, my duty imposes on me the unpleasant task of condemning both the vessel and cargo, as lawful prize, according to the prayer of the libel.

RICHARD PETERS.

11*th September*, 1812.

From the decree of the judge of the district court, an appeal was entered to the circuit court of the United States for the third circuit Pennsylvania district, and the case was fully and most ably argued for

* See case of the Carolina, 6 Rob. 461.

† 6 Rob. 458.

the claimants by Messrs. Binney and Hopkinson, and by Mr. Dallas for the captors. The decision of the district judge was confirmed by his honor judge Washington, and from the circuit court no appeal was made.

The following opinion was delivered by Judge Washington.

I have perused with attention, the papers, and the authorities, which have been exhibited and cited, in this cause; and I proceed, with perfect satisfaction, to pronounce an affirmance of the decree of the district judge.

Trading with an enemy, was an offence against the maritime law, long before the American revolution; and, as far back as the records of the English admiralty can be traced, it appears incontrovertibly, from a series of direct and uniform decisions, that the vessel and cargo of a subject, taken in the act of trading with an enemy, were liable to condemnation, in the prize court, as prize of war, to the captors.

The principle which prohibits trade and commerce with the enemy, exists therefore, independent of those opinions and judgments, which have been pronounced by Sir William Scott, subsequent to the revolution: and to that principle I should resort, on the present occasion, with complete confidence, although no adjudged case in point, could be introduced.

If trade and commerce with the enemy are unlawful, carrying the public dispatches of the enemy (the worst kind of commerce with the enemy) cannot be lawful. The same principle of the maritime law, which makes that species of trading, which consists in the mere intercourse of buying and selling, an offence; with stronger reasons, for the public safety, must condemn the act of conveying intelligence to the enemy. The argument from analogy is irresistible, I repeat, independent of all authority.

Nor is it an adequate answer to this course of reasoning, that the offence committed by a citizen, in carrying the dispatches of the enemy is an offence at common law, or by statute. The same may be said of trading in the strict sense with an enemy, which is unquestionably, a misdemeanor at common law. In both cases, the offender may be prosecuted personally; and, in both cases, the offending vehicle, if taken in the unlawful act, may also be condemned as prize of war. In neither case, does the condemnation proceed on the ground of the party being actually an enemy, nor of the property being actually owned by an enemy; but in both cases, the party acts as if he were an enemy; and, therefore, the maritime law, treats the property, as if it belonged to an enemy.

Upon the whole, I do not think it necessary to go into a further detail of the grounds of my judgment, as I have not the slightest doubt upon the case.

Let the decree of the district court be affirmed.

IN THE

DISTRICT COURT OF PENNSYLVANIA.

In the case of the United States
v
Ship Ariadne, Bart. Holmes, master, Nathaniel Goddard owner, and her cargo.

Captured as prize by the U. S. brig Argus, Arthur St. Clair, Esq. commander.

DECREE.

The libel is in the common technical form. The vessel and cargo are proceeded against as "belonging to the government of the United Kingdom of Great Britain and Ireland, or to persons being subjects thereof, and as such, or otherwise, liable to confiscation and condemnation," &c.

It is conceded, and if it were not, it appears by the papers found on board, and exhibited by the captors, that both vessel and cargo are *bona fide* the property of citizens of the United States; and the cargo, consisting of flour, belonging, in certain designated portions, to the owner of the ship, Nathaniel Goddard, and other citizens of the United States, was laden on board, at the ports of Baltimore and Alexandria, from which latter port she sailed on a voyage to Cadiz in Spain; and in the prosecution of

her voyage, she was captured by the Argus, and sent as prize, into the port of Philadelphia.

No circumstances of improper conduct in the captured inducing suspicion, are either shown or alleged. On the contrary, by a most unwarrantable misconduct in the captor, no witness or witnesses, is or are sent in with the vessel, or produced for examination upon the standing interrogatories. After the hearing had commenced, the master who had been detained on board the Argus, was sent from New York; but much too late for legal examination, according to the established course of proceeding. The court, whose duty it is to examine as well into the circumstances occurring at the time of capture, as they relate to the captured, as into the conduct of cruisers; is bound to pronounce its marked disapprobation of negligence so gross. In such cases the court has established a rule, that claimants shall not be delayed on this account. In cases where no claimants appear, all proceedings for the purposes of condemnation will be stayed. Instances of such negligence have been multiplied; and have forced on the court a determination, so far as its powers extend, to reform a mal-practice, which may be attended with consequences highly mischievous.

The hearing in this cause having been delayed; the court, conceiving itself warranted by the state of the season, the situation of the ship, and the circumstances of the case, directed both vessel and car-

go to be delivered to the claimants, on giving security, in the appraised value, to abide the final sentence and decree of this court, and the court or courts of appeal.

That the situation of the vessel and cargo might be known, as it was at the time of its being placed in the custody of the marshal, and of its delivery over to the claimants; the court directed an inventory to be taken and filed, and ordered a survey of the ship, her tackle, apparel and furniture.

It is superfluous to state more of the documents and papers exhibited than such as are relied on by the captors, either for condemnation, or justification, or what are otherwise materially necessary in the case.

The cargo, by all the shippers, was consigned to captain William Farris, who went as supercargo in the vessel. He was instructed to sell the cargo, consisting wholly of flour, at Cadiz, and to remit the proceeds, in good bills on London; the greatest proportion to Samuel Williams, Esq. merchant, No. 13, Finsbury Square, for account of the shippers. There are instructions to Farris, from all the shippers, to the same purpose; except those from Samuel May, owner of 500 barrels of the flour, which are in these words "the nett proceeds of five hundred barrels of flour, which you have of mine in your consignment, you will please, when realized, remit to Henry Bromfield, Esq. merchant, London,

for my account; in such mode as you may judge most for my interest."

In the instructions from Nathaniel Goddard, the owner of the vessel and part of the cargo to William Farris, dated Boston, September 9th, 1812, he mentions (after directing his share of the proceeds sold at Cadiz to be invested in bills and remitted to Samuel Williams, Esq. in London.) "From recent interruptions of regular supplies of flour at Cadiz, we are led to believe, that the demand for this article will be such as to insure you a valuable market, in the event of safe arrival; nor can we entertain a doubt, that the policy of Great Britain will lead her cruisers to abstain from offering any impediment to the free passage of vessels destined for Spain and Portugal; under this impression we have been induced to make the shipment now under your care, firmly believing that the same indulgences which have occasionally been extended to Sweden and other enemies, by Great Britain, will be shown to ships of the United States, carrying supplies absolutely necessary for the suffering inhabitants of Spain." "You will also please to remit the sum of nineteen hundred and ten dollars, to Samuel Williams, Esq. London, for account of Samuel F. Coolidge, Esq. of this place, to be assessed on the whole cargo." "As it is possible some unforeseen event may turn up, in the course of the voyage, you will act, in such case, as you may think prudent, and most conducive

to the interest of the concerned; being careful not to violate any laws or regulations of the United States, or the municipal, or other regulations, of the place you may visit."

The instructions from Nathaniel Goddard, dated 14th September 1812, at Boston, to Bartlet Holmes the master, direct him to invest and remit the amount of freight, (paid by Farris for account of other shippers) "in good bills on London (except what may be wanted to purchase salt, and for other disbursements) at the best possible rate, to Williams in London, for my account, and subject to my orders." He enjoins against detention of the ship, even if it were to ballast with salt, but orders him to proceed directly back to Alexandria for another cargo.

He repeats, in epitome, his ideas as to the policy of Great Britain; and adds, I trust the same will be shown to us, her declared enemies, carrying supplies for her suffering allies, the patriotic inhabitants of Spain; and on returning with salt to the United States, for the continuation of the same business. But as there are other cruisers on the ocean, it will be prudent to avoid if possible speaking with any vessel, of any description, on either of your passages. You will, on entering Cadiz bay, avoid the French side with great care, that you may not meet with cruising boats. You will take no cargo or adventures, but flour, and nothing home but salt, and be careful that no adventures are clandestinely stowed

away, to expose the safety of the ship; and in no case, violate any laws of Spain, or the United States.

At the time of capture, there was found on board the Ariadne, and exhibited among the papers delivered into the custody of the clerk of this court, the passport, or by whatever name it is called, whereof the following is a copy.

(Stamp. Arms of the British king.)

Office of his Britannic majesty's consul.

I, Andrew Allen, jr. his Britannic majesty's consul, for the states of Massachusetts, New-Hampshire, Rhode Island, and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed to me by Herbert Sawyer, Esq. vice admiral and commander in chief on the Halifax station.

Given under my hand and seal of office, at Boston in the state of Massachusetts, this ninth day of September, in the year of our Lord, one thousand eight hundred and twelve.

(Signed) ANDREW ALLEN, Jr.

(Consular Seal.)

To the commanders of any of his majesty's ships of war, or of private armed ships belonging to subjects of his majesty.

Whereas from a consideration of the great importance of continuing a regular supply of flour and other dry provisions to the ports of Spain and Portugal, it has been deemed expedient by his majesty's government, that notwithstanding the hostilities now existing between Great Britain and the United States of America, every protection and encouragement should be given to American vessels so laden with flour and other dry provisions, and bound to the ports of Spain and Portugal.

And whereas in furtherance of these views of his majesty's government, and for other purposes, Herbert Sawyer, Esq. vice admiral and commander in chief of his majesty's squadron on the Halifax station, has directed to me a letter under date of the fifth of August 1812, a copy whereof is hereunto annexed, and wherein I am instructed to furnish a copy of his letter certified under my consular seal, to every vessel so laden and bound either to any Portuguese or Spanish ports, and which is designed as a safe guard and protection to any such vessel in the prosecution of such voyage. Now therefore in pursuance of these instructions I have granted unto the American ship Ariadne, Bartlet Holmes master, burthen three hundred and eighty two $\frac{3}{95}$th tons, now lying in the

harbour of Alexandria, laden with flour and bound to Cadiz or Lisbon, the annexed documents to avail only for a direct voyage to Cadiz or Lisbon, and back to the United States of America. Requesting all officers commanding his majesty's ships of war or private armed vessels belonging to subjects of his majesty, not only to suffer the said ship Ariadne to pass without any molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to Cadiz or Lisbon; and then return thence laden with salt or other merchandise to the nett amount of her outward cargo, or in ballast only. Given under my hand and seal of office at Boston, this fifth day of September, A. D. 1812.

(Consular Seal.) ANDREW ALLEN, Jr.
His majesty's consul.

(Copy.)

His majesty's ship Centurion at Halifax, the 5th August 1812.

Sirs,

I have fully considered that part of your letter of the 18th ult. which relates to the means of insuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, and being aware of the importance of the subject, concur in the propositions you have made. I shall there-

fore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels so laden and unarmed, *bona fide* bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal.

I have the honour to be, Sir,

Your most obedient

Humble servant,

(Signed) H. SAWYER, Vice Admiral.

ANDREW ALLEN, British Consul, Boston.

I have given to this case as much of my attention as I could bestow; and confess myself at a loss to find the relevancy of many of the authorities, and of a great portion of the arguments, used by the captor's counsel. Whether they are seriously insisted on, for the purpose of condemnation, or to repel the claim of damages, I cannot accurately determine. The case will not rest with me, and I shall therefore leave the ultimate decision to superior tribunals; contenting myself with such observations as occur to me, in the progress of my march to the consummation of my duty; which is to place the case in a situation for an appeal.

I have changed accidentally, the order of the points, and shall make some observations on them, in the method in which I have stated them.

Here is an American vessel, clearly doocumented as such—with an American cargo, indisputably belonging to citizens of the United States—sailing on a lawful voyage—cleared out for the port to which she was destined—and, on that voyage, captured as prize, by one of our own public ships; under none of the circumstances generally justifying suspicion of fraud, or concealment, either of destination, or enemy interests—acknowledged to be engaged in a fair and lawful trade—without the most distant imputation of ulterior commerce with the enemy, save that as much of the proceeds of her outward cargo, as remained (after paying contingencies and finishing a cargo or ballast, of salt, with which she was to return to the U. States, and again pursue the course of trade into which she had now entered) was to be remitted, to London in bills of exchange, not specified to be English, but good bills, and in one part, good bills on England, the remittance to be made to American citizens, permitted to remain there. Were these proceeds at any time to be lodged for enemy account? The direct contrary appears. In every instruction from the shippers, the declaration, that the funds were to remain for their use, and at their order; is made and reiterated. Nor do the counsel for the captors allege, that the declaration was fallacious. They could not allege this without

violating all candid and plain evidence of the fact; and of this they are incapable. But, it seems, they discover what I must doubt whether the captor ever thought of, that remitting the proceeds in bills of exchange, though it had been the course of trade before the war; is now the same as if merchandise, or money, had been sent. And thus an ulterior destination, or trade with the enemy, is endeavoured to be shown from the papers found in the ship; and the ulterior destination being alleged to be unlawful, the vessel and cargo are said to be forfeited as prize; though the commencement of the voyage be legal. If their premises were sound, their conclusion would inevitably follow. For no trade can be lawfully carried on indirectly with an enemy, by going first to a neutral port, and investing there the proceeds, in a cargo, sent, in continuity of an orginal or otherwise unlawful plan, to an enemies country. I shall omit taking notice of cases on this point. If applicable here, they would prove the position taken by the counsel.

I do not dispute the general doctrine, but its application depends on the identifying bills of exchange, with bullion, or merchandise. Now, although a definition of a bill of exchange, according to the phraseology of Blackstone, and a dictum of a Pennsylvania court, from 2d Dallas, is introduced, to show the sense of the elementary writer, and the opinion of that court, on the nature of a bill of exchange;

and it is defined by the one, and held by the other, to be "a mode of remitting money;" and equivalent thereto, in legal contemplation; I am not convinced that the definition, or the opinion, is as a general position, practically sound or correct. For, though true it is, that it is "a mode of remitting money;" mercantilely speaking, it is the mode of establishing a credit, which serves the purposes of money; often effected without the intervention of bullion, or actual money; and not adding to or deducting from, the aggregate of bullion or money, of the country in which the credit is placed. Technically the deposits may be called funds. But this means, any stock or capital, on which credit is founded. It does not necessarily imply money. It would, indeed, be a severe application of definitions, *or dicta*, to found on them the ruin of our own citizens, engaged in a commerce, undeniably lawful; so far as it had proceeded. With all the industry of the captor's counsel, they have not produced a single decision, directly to their point. In Chitty's "Practical Treatise on the Law of Nations, &c." in 1812; Boston ed. 25, it appears, that no decision had taken place in England, to prove the illegality of bills of exchange, drawn in one enemy country, on another. Nor can I find one, so far as my opportunities enable me to search, in any book of legal authority, of any other country. Chitty's words are, "an attempt was made by the counsel, in the case of Detastet *v* Baring (ii East. 268, 2 Campb. 86) to establish, that no bill

drawn from an hostile country upon this, could legally be passed here; but upon this point the court do not appear to have given any opinion. In several recent instances, of bills drawn by British prisoners in France, upon this country, holders, with full notice of the circumstances, have been permitted, at *nisi prius*, to recover; on this ground, that otherwise prisoners of war might be deprived of the means of comfortable subsistance." It seems, then, that even common law courts, consider the convenience and necessity of a case, a sufficient ground for its legality. On the like convenience and necessity, Sir W. Scott has restored goods, withdrawn from an enemy's country, without a license for so doing; which, in ordinary cases, is essential. 4 Rob. 195 Eng. ed. I do not believe, that any one acquainted with the trade to Cadiz, will assert that it could be carried on, to any great extent, without the purchase of bills on England, or those ultimately resulting in British funds. It was inextricably interwoven in the trade, before the war between this country and England; and is now quite as much required. True, you can get bills on other countries; but these, by a circuitous operation, generally result in British funds. Cargoes, equal to the proceeds of those we send, cannot be obtained. Specie may sometimes be exported by permission. It is sometimes, secretly and at risk, brought off; but the general current of dealing is, to vest the proceeds in bills of exchange; and British bills are the most common; and most beneficial

for us to buy, or receive in payments. True also, the British agents make purchases in the Cadiz market, in one way or other, of some of our cargoes, in common with or through the intervention of the Spanish government, or subjects. But, if we do not carry our commodities directly on British account; sales to British agents at Cadiz, without any preconcert, are as lawful, as are those to any others. Sell them to whom we may, British bills are common in payment. Of what advantage, then, would be our lawful commerce to Spain and Portugal, if it were settled by our courts, that remittances of those bills, or intention to remit them, forfeited our vessels and cargoes, if intercepted, by our cruisers on their passage? Shall not therefore, our courts, and especially our prize courts, to whom great latitude is given by the laws of nations, consider convenience and necessity? Particularly in a case wherein no law of our own country, or of nations, can be found, forbidding, in any definite terms, these paper operations: For I consider them, in practical effect, nothing more, and in fact, leaving a balance favourable to us, and against England; at the close of the whole transactions. I am not convinced to the contrary, by the ingenious constructions and deductions and consequences from, what the counsel for the captors deem principles. Their mode of cutting up this trade by the roots, would be accomplishing, through the judiciary, the destruction of one of the few

branches of commerce remaining to us. However well or ill founded, objections to remittances of proceeds to the country of the enemy, or sailing under its passports, may be; the trade will be short lived, unless both are permitted. The aid of our own cruisers will not be required for its complete extinction. If it be deemed right, that this trade should be abolished, let it be done by the legislature, if they shall think proper, and not in an indirect way.

In the course of the hearing, I threw out for inquiry, my belief that since our declaration of war, bills of exchange on London, to a large amount, had been purchased, and remitted by the treasury department of the United States; and probably, to be sent into a country hostile to Great Britain. I have it in my power to prove, by indisputable evidence, that my belief was well founded. I mentioned the fact (for so it is) not with the view of thereby alone establishing its lawfulness—for if it were illegal, that could only be done by an act of the legislature. But to show the sense of a department so extensively influential and exemplary, as to the innocence and policy of the practice. Can it be contended, with any candid or forcible argument, that a citizen shall be liable to forfeiture of his property, for an operation essentially necessary in the course of his trade, which has been sanctioned and practised on, by an authority so high?

Let it not be said that "this was a governmental act; and a government can do what an individual cannot." A fiscal officer is not the government, nor would he do any act contrary to our laws, or to those of nations.

The legislature have refrained, with a full knowledge of the mode in which purchases and payments are made, and every other circumstance concerning it, from passing any prohibitory law, either against the trade or the passports, used for the safety of our ships. They have not only refrained, but refused in effect, to pass inhibitions. But all this would operate as a trap to our citizens; simply presuming themselves pursuing lawful voyages, while they are subject to capture by our cruisers, and condemnation by our courts.

I can see a strongly marked distinction between a solitary case of a voyage, begun with a view to lodge permanently, and mix with the mass of enemy property, the proceeds in an enemy country; and voyages lawfully made, wherein the interest of trade indispensably require payments in bills, to be remitted to a hostile country, to be drawn out again for the use of the trader. I agree that while in *transitu*, as I conceive it, though temporarily commorant in the enemy state, they may by an act of power be seized, taxed, or used. But the interests of states at war, in the times now existing, and particularly of England, forbid such exercises of power. The *spell* of confi-

dence in her good faith, would be at once dissolved by any violence committed by her government, in regard to funds placed within her control. I depend for results on the interests of nations, more than on mere refined or laudable motives. I am not exactly informed, but I believe that intercourse of exchange is common between hostile countries generally, though it may be subject to more or fewer interruptions in some than in others. No period of history ever exhibited so extensive a scene of warfare and desolation, as the time in which we live. Relaxations of old principles, better settled than the one now contended for, necessarily take place, in the present state of the world among nations at war. Shall we then, to whom such relaxations are as necessary as they can be to any other nation, insist on their severities, and visit them on the heads of our own citizens? The old routine of a kind of barter, by sending cargo for cargo, has long ceased. Credits, called funds, or the paper representations of them, are lodged in one part of the globe, for enterprizes of trade in any or every part of it. They are placed in the country, either directly or circuitously, from whence they can be most conveniently drawn, or in which with most safety, they may temporarily remain. With the country, now our enemy, we have long had, and since the war, have innocently continued extensive commerce. We have large amounts of funds lodged there, and owe considerable debts. Intercourse

by exchange, is more particularly required with them than with any or most other countries, for obvious reasons. I believe funds are withdrawn and debts paid, in and by bills of exchange every day. I am told that government ought to *consent*, even to payments of "debts." I think justice and good faith require, that we should continue paying; and though an act of the British parliament makes the intervention of the secretary of state necessary, there is no prohibition till government *prohibits*—vide 8 Term. Rep. 71. The machinery of exchange, when even solid funds are its moving powers and principle, is in fact, buying a debt, and innocently and justly accomplishing its payment. I am referred to a transaction in England in the time of Mr. Pitt, when an act of parliament was passed, originating in the intention (whatever were the terms in which it was conceived) to prevent French citizens from withdrawing their funds. This was done to save the property of a class favoured by Great Britain, and on a special emergency, and not on a general principle. It proves, however nothing more strongly, than that it required an act of parliament to prohibit, what was before lawful.

Having in the best way I am capable of, disposed of the most important parts of the points in discussion, I might leave without multiplying remarks, the

objections made on the subject of the 1910 *dollars*, to be assessed on all the cargo, and remitted to Williams for account of Coolidge, who is also an American citizen; and the instruction given by Samuel May to Farris, as to the ultimate investment of the proceeds of his adventure. The circumstance of Williams, Coolidge, and for aught I know to the contrary, Bromfield, being American citizens, and Coolidge resident in the U. States, I only mention to show the improbability of British interests. For one of our citizens resident in a foreign country, in a permanent situation as a trader, is identified with a subject of that country, to certain intents. Nevertheless, at the breaking out of an unexpected war, though a citizen may have been cormorant in a house of trade before hostilities, reasonable time for his return to his country ought to be given, before either he or his property be treated on a hostile footing by us. It does not appear for what purpose the 1910 dollars are to be assessed, and used by Coolidge. It is all conjecture; but let it be granted, that it is as compensation or *bonus* for A. Allen's certificate of the safe conduct or passport, hereafter mentioned. I see not that this, either in its principle or amount, should work either condemnation or justification of the capture. Coolidge may have obtained the document, and sold it at what price he could obtain—And yet no illegal effect be produced. I believe it is notori-

ous in all countries, that passes or licenses, from even sovereigns, are objects of purchase and sale in the market; and who receives the benefit of them is not an essential inquiry. On a presumption so vague, and with no other ground for certainty or conjecture, I cannot conceive the capture can be justified. If the whole of the shippers receive whatever advantages it can afford, they ought proportionately to pay the expense of obtaining it. I say nothing in approbation of the practice; but I know of no law inflicting confiscation on those who engage in it.

The last ground taken by the counsel for the captor, on this part of the subject, is, that of the instruction by Samuel May to Farris. In whatever mode the proceeds of his adventure were to be remitted, it must so be for May's account. Let it be remembered, that Farris in his general instructions, is inhibited from violating the laws of the United States (the laws of nations being included in them) or those of the places he may visit. This was an abundant caution;—he was bound to observe those laws, without specific instructions. But with all this monitory caution and his general obligation, should I be warranted in presuming, that he will take an illegal mode of remittance? He is not compelled by any duty to his principal, to remit cargo, or any article in breach of the laws of nations, or those of his coun-

try; however apparently advantageous, such remittance might be.

The remaining point insisted on by the counsel for the captor, is the illegality of the safe guard, contract, or passport, called, in my opinion, improperly, a *license*. The paper which has been the theme of so much observation, I do not classify among these acts of sovereignty, styled licences; which in modern times have increased in number, beyond all former example. It would be a most toilsome, and in this case, an unnecessary task, to go into a history of their nature or objects. I have read many discussions on the subject of them, and have reaped very little substantial benefit by the perusal. British writers disagree, as to their principles and utility; even to the nation from whose government they issue. Some, reprobate them as stimulants and incitements to perjury, and immorality of various kinds. They declare them injurious to England; and even that they have rendered their whole system of maritime law, as it regards commercial rights and regulations, nugatory; and have torpified their navigation act, into a dead letter. They have thrown advantages, at the expense of their own ship-owners, into the hands of enemies and neutrals. But my reading on this subject is not very extensive. I have however, never before met with any complaints by neutrals, or enemies to England, while their subjects or citizens possessed advantages and freedom from cap-

ture; under these partial exemptions from the rigors of war. I agree with the counsel for the captors, that when a licensed trade is opened generally, or by special license, which is only tolerated by such license, and was not before free or lawful, as between ports of enemies; the consent of both sovereigns is necessary. It could not be effected without such mutual agreement. But I deny, that where a protection is given by one sovereign to the ships of his enemy, employed in a trade not depending on a license, but lawful to the vessel protected, any consent of both governments is necessary. Suppose a case, that Great Britain were to order generally, all her cruisers to abstain from captures of our ships bound to Cadiz or Lisbon, with certain cargoes. Would any one contend that our government should consent before our ships could enjoy the benefit? and that we should condemn our vessels, for sailing in safety, under such general orders to British cruisers? Where, then is the difference between all, and one vessel so sailing, always taking it for granted that there is no fraud in the case agreed, that British interests not immediate, but in some way, ultimately implicated, prompt such exemptions and indulgences? But this renders not the exemption illegal, or less beneficial. *Quixotism* among nations, is not to be looked for. Some consideration of benefit, is always at the bottom of concessions of this nature.

The class of cases whereof *The Hoop*, in 1st. Robinson, is the leader, may be dismissed from our notice; as not applying to a lawful trade, not one of course, depending on licenses. Our trade with Lisbon or Cadiz cannot be affected by the principles laid down in the case of The Hoop. It is a lawful trade to us; and all the advantage we enjoy from British passports, more commonly than correctly, called licenses, is freedom from capture by their cruisers; while we are prosecuting our lawful voyages. When a trade is deemed by one enemy, only beneficial to its adversary; it may, and does, refuse to consent to its subjects, or citizens, receiving licenses, or privileges, to engage in the traffic. Trading to enemy ports is unlawful in itself; and is often forbidden, and punished, by municipal laws. Such is our case as to trading to British ports. But although passports, called licenses, have long been in use, to exempt from British capture, vessels going from one lawful port to another; no instance can be shown, in which the consent of our government was ever asked, or deemed necessary. Our government may inhibit the practice, but until they do, I must act according to the suggestions of my own judgment.

Having, to preclude repetition, made these general observations, calculated to meet objections made in this cause; I proceed to consider the paper, to which the law respecting licenses has, in my view of it, been

improperly applied. Although common parlance and common acceptation, do not amount to legal definition; they often lead to a good classification and understanding of subjects. Our merchants have, habitually fallen into a nomenclature of the various British exemptions from capture, current among us, which is descriptive of more than the mere names. Some are called *Fosters*, some *Sidmouths*, and those whereof that under consideration is one, are called (not Allens but) *Sawyers*. Now, according to the drawing exhibited in the objections made on behalf of the captor, admiral Sawyer is thrown in the back ground, and Mr. Allen is brought prominently forward; I cannot see that the fact, or law of the case, warrants this mode of grouping and placing the figures. It is said, "that Mr. Allen has presumed to exercise a portion of sovereignty, within our territory, and that the captured have assisted him, in this invasion of our national rights and dominion." I have read the paper over and over again, and confess I can see nothing in it, to justify so serious a charge. I see more official form used, possibly from a lingering habit, and not intentional offence to us, than was necessary; and which might have been omitted. But, strip the paper of such redundancies, and it is nothing more than a certificate (calculated to operate on the British commanders, and with no apparent view to interfere with our sovereignty, or to assume any right to exercise the power of his own

sovereign, in a way substantially offensive to us) purporting that admiral Sawyer had written to him, a letter, whereof he attests a copy; by which it appears, that our vessels laden with dry provisions, unarmed, and *bona fide* bound to Portuguese, or Spanish ports, are not to be molested by the squadron under his command." It appears, that this was done by admiral Sawyer; in furtherance of the views of his majesty's government; and therefore if any act of sovereignty exists in the case, it was exercised out of our territory. And it is as much exterritorial, as are the Sidmouths; which are acts of sovereign authority, inchoate in England, but consummated here. For they are sent in blank, sold in our market, and filled up, within our territory, with the name of the vessel, description of the voyage, &c. by those to whom the distribution is committed. And yet the counsel allow, there is no invasion of territorial rights, or sovereignty, or any illegality, in such passports. Now I cannot see that Mr. Allen's conduct is more offensive, or illegal, than is that of those who perfect a Sidmouth, and apply it to the vessel and voyage requiring it, by filling up the blanks, and thus consummate the validity of the document, within our territory. What are called Foster's are permissions or passports from the ex-minister Mr. Foster, many, if not all, composed or perfected and delivered, within our territory; and given by one who had no more authority, as it regarded us, than has an ex-consul.

In the case of the Tulip, I laid it down, that Mr. Foster's passport would not have been illegal, had it not been accompanied with the engagement of the vessel in enemy service. This opinion was confirmed, or not objected to, by the superior court. The council do not dispute, on the contrary they allow, the innocence and legality of such passports. But I am told, that the Sawyers safe conduct or passport—for so I consider it, includes a contract, that the vessel shall go to the place designated, and no other; and it is therefore an engagement with the enemy. I see no such engagement. Every one knows, that passports, or even licenses are forfeited, and are no longer protections, if used for other voyages, or purposes than these designated. If those possessing the limited indulgence, choose to deviate, and forfeit its advantages; they have their election.

A Sawyer (for brevity sake, I use the current nomenclature) contains a permission to return safe, with lawful cargo; for so Mr. Allen certifies was Admiral Sawyer's intention. A Sidmouth, I believe, does not thus continue the permission. It is only material to the party concerned; and the return privilege is no more offensive to our laws, than that for the out passage. But it is said Admiral Sawyer had only a limited command, over a squadron. This and many other objections, would have been more in place, in a British prize court. But the more limited his authority, the less proof is there,

that either his act, or that of Mr. Allen, was one of sovereignty. The English government have not viewed either Mr. Foster's or Admiral Sawyer's permissions, or safe conducts, as sovereign or national acts; for they have thought it necessary to confirm and validate them. If this be so, why we should consider the paper in question as an exercise of sovereign authority, for the purpose of implicating our citizens in the consequences, and thereby forfeiting their property, I cannot account, or reconcile with my opinions, either of law, or the principles of justice. This would be inflicting on our citizens, under pretext of participation, the penalty incurred, as it is alleged by Mr. Allen, for his supposed offence.

But, "the consular seal was directed, by Admiral Sawyer, to be affixed to any copy of his letter, accompanying the papers of the vessel using it," as a safe-guard, or warrant to pass. With regard to us, this is of no consequence. The whole paper, and all other such, are not to operate within our territory. To us, and our laws, they are of no more validity, than are the forgeries of other passports, which have been plenteously spread through our country. But to British cruisers, on whom alone they are to operate, it is important that the documents should be genuine. The impression of the consular seal was therefore, a symbol, essential to show that the paper was not counterfeit. This emblem might have been

any thing else, but the seal had been known, and respected. Mr. Foster may have innocently sealed his passports, with armorial bearings; a pageant of British heraldry, of which I do not mean to speak with direspect. But they are as obsolete, and of as little authority among us republicans, as is the impression, or are the emblems, of a vacated seal of an ex-consul. The one however, is as harmless as the other. We are not to judge for those whom such impressions are to affect; nor are we to mulct our citizens in forfeitures, on account of them; or because a late consul had raised up the shades of his departed formularies, after his office was defunct.

Mr. Onis's passports are agreed to be harmless and lawful. Yet they are given within our territory; by one, however worthy and respectable, yet not as I believe, formally acknowledged. I have merely noticed these and others, by way of illustration; and I think it useless to add more, though it might be done.

The embers of Mr. Genet's transactions are disturbed, for the purpose of comparison between this case and them. Trouble enough had I, in the unpleasant period of their existence; and when the subject was now brought up, the "*jubes renovare dolorem*" suggested itself to my mind. I shall speedily dismiss it. I do not see any resemblance. The one was an egregious violation of our territorial rights, and of the laws of neutrality. Courts, attempted

to be erected in our country; cruisers, fitted out to annoy our then friend; foreign commissions, issued for warlike purposes, in the country of a nation at peace; our citizens seduced from their duty; and the whole tending to involve us in war.' The present, so far as it reaches, has a direct contrary tendency. I have said enough, whether correct or not, to show my sense of the subject now under my consideration; and from my preceding remarks it will be seen, how little analogy there is in my opinion between the cases.

I shall also dismiss as concisely, the remarks made on the instructions given to Farris; for I have really extended my observations, led on by the general importance of the subject, to a length I had not myself contemplated. No mention is made of the Sawyer in these instructions: only general observations on the probability of British indulgence. I see nothing reprehensible in this. If Admiral Sawyer's command extended only to limits short of Cadiz, there was a part of the track unprotected; to which those general observations applied. The caution to avoid French boats, &c. was not unwise or unlawful. Our vessels have been captured by them, under pretexts less solid, than having an enemy pass on board. The injunction to avoid all vessels, was not reprehensible; even if it included our own. I must say, with most sincere regret, and not with the most distant idea of as-

perity, that I think the present claimants, have sufficient proof of the prudence of that precaution.

The only remaining point is, in what manner, or on what terms, the restitution of this vessel, and cargo, are to be made? For it may be perceived, that it is my intention to restore them to the claimants.

I hold it to be my duty, as it is my inclination, to render every assistance within the scope of my judicial authority, to our cruisers conducting themselves with propriety. But I am also bound to protect the captured, from unnecessary seizures, delays, and losses, when I think the capture unlawful.

The bias in foreign courts (complained of by us, when neutrals) to throw every thing, in any way possible, into the scale favourable to captors, must not be imitated among us. How to define with precision—"probable, or reasonable cause," is a difficult task. I shall leave it to the superior courts. For myself, I think, it should rest on strong facts, apparent at the time of capture. Such as double papers by way of deceit, but false and colourable; want of proper ship's papers; prevarication by the master, or other officers and crew, examined in *preparatorio*, which, in this case has not been brought to the test, by the conduct of the captor; false destination; papers thrown overboard; &c. &c. But these are all facts. I cannot conceive that a cruiser is excusable, for sending in a vessel of a friend, or of our own citizens for adjudication, on mere points of

law. If they are against him, he takes the consequences. And I think this is the situation of the captor in this case.

It remains now, that I close a discussion, protracted by the novelty of the subject, the variety of matter suggested in the course of the hearing, and the considerations rising out of the circumstances of the case. That the vessel and cargo should be restored, appears to my mind, clearly shown. As to damages, there are some which inevitably follow restitution; however open to objection, others may be deemed to be. The vessel must be restored in the condition in which she was, in every respect, at the time of capture. Abstracting the officers and crew was unjustifiable; and every expense consequential on that, as well as other circumstances, entirely out of any questions of probable cause, ought to be retributed.

I decree, however, generally; that the vessel and cargo be restored to the claimant's, with damages and costs.

RICHARD PETERS.

11*th February*, 1812.

IN THE

DISTRICT COURT OF PENNSYLVANIA.

In the case of the United States
v
Brig South Carolina, and her cargo.—Gaul, master.

Libelled as prize—captured by the U. S. frigate Constitution, Bainbridge, commander.

DECREE.

This vessel is, indisputably, an American ship, belonging, *bona fide* to a native citizen of the United States, John C. Stocker, jun. who has interposed his claim. There is not among the papers found on board, nor according to the deposition of the master, Gaul, on his examination in *preparatorio*, was there at any time, any paper or document, evidencing any cause of suspicion that this vessel had been, or at the time of her capture, on the 9th November last, was, in the prosecution of any unlawful trade. The master, Gaul, swears that all the papers were delivered up, none having been burnt, destroyed, or concealed. The claimant, in his affidavit annexed to his claim, swears that the vessel was chartered to Willing & Francis, known to be native citizens of the U. States, for a voyage from Philadelphia to Lisbon,

where she arrived with a cargo of flour, corn, &c. wholly the property of American citizens, or of Portuguese subjects, as he believed, at the time of its shipment, and still doth believe. He states that he had no participation in any application for a passport or license from the British government; but believes there was put on board by the shippers, a letter of request, given by Mr. Foster, the late British minister, that she might be permitted to pass unmolested, but which he, the claimant, never saw. He swears that no enemies of the U. States, their agents, &c. ever had, nor have now, any right, or property, in the vessel; and adds his belief, that the cargo was the property of Willing and Francis, or of Portuguese subjects. The outward cargo was, as the master swears, delivered at Lisbon to a Mr. Sampayo, a Portuguese subject. The vessel was on her return from Lisbon to Philadelphia, in ballast, when captured.

Among the papers found on board, and delivered into the custody of the clerk of this court, by the captor, was a Pass, commonly called a *Foster*, in the following words, &c.

"126.

"*By Augustus John Foster, Esq. his Britannic Majesty's Envoy Extraordinary, and Minister Plenipotentiary to the United States of America.*

"These are to request and require all whom it may concern, to allow the brig South Carolina, of

register 193 $\frac{19}{95}$ tons burthen, or thereabouts, laden with flour and corn, commanded by Richard Gaul, and bound to Lisbon from Philadelphia, and to return ballasted with sand, or salt, into a port of the United States—to pass unmolested.

" Given at New York, under my hand and
(Seal.) seal this eighth day of July, in the year of our Lord one thousand eight hundred and twelve."

(Signed)

" AUG. J. FOSTER."

There does not appear to me, on account of this pass, or on any other consideration, any cause for the capture of this vessel. Farther proof is not necessary; as the whole case, on the face of it, is fair, and *bona fide*. If there were grounds of suspicion, of any decided nature as to the cause on the outward voyage, because it appears by the examination of captain Gaul, that it was consigned to a house in Lisbon, or person of a name, said to be connected with the enemy; nothing appeared at the time of capture, or doth now appear, to warrant the court in the exercise of its discretion in requiring farther proof. The owner of the vessel had no knowledge of or concern with, the character of the consignee, nor any interest in the

cargo. Nor am I to presume any fraudulent transaction, even if it were proved that the consignee was, in other matters, connected in dealings in enemy supplies. The cargo in this case, is alleged (and nothing appears to the contrary) to have been the property of citizens of the United States, or of Portuguese subjects, in amity; and its destination fair and lawful. It is only from the papers found on board, where no prevarication, or other improper conduct, on the part of the captured, is evidenced, that I am to form an opinion. No false or colourable papers, nor any misconduct in the officers or crew of the South Carolina, at the time of capture or since, are shown. A captor is not justifiable in sending in the vessel of a fellow-citizen, or a friend, under bare suspicions, whereof no proofs appear at the time. Nor is he entitled to farther or any proof, when all the papers, and the whole conduct of the captured are fair; and give no ground for warrantable suspicion of fraud. It cannot therefore, be on account of the circumstances mentioned, that this vessel is brought under the cognizance of the court.

It is entirely unnecessary for me to repeat my opinion as to Mr. Foster's Pass; or, as it is called, Letter of Request. On the policy of permitting, or forbidding, such, or any other passes, or licenses of any kind (other than such inhibited by our laws) I have no judicial opinion to give. The state of the world has rendered them common and familiar. Whatso-

ever articles, the indispensable demands of nations, though enemies, as the greatest number now are, require, they will obtain from each other in some way. If special passes or licenses are frowned on, they may promulgate general permissions to trade to places accessible to them, in designated articles necessary to them, free of capture from their cruisers. But these are considerations most proper for other departments of the government. I have only to decide on the lawfulness of their use by our ships. I have given, on former occasions, and repeat in this, my opinion, that our vessels are not subject to capture and confiscation by us, on account of the pass in question, or others similar thereto. Such passes are granted, it is true, form causes indirectly serviceable to the enemy, but under them, our ships may proceed innocently, as they do safely, to and from ports or places lawful to us.

It must have been generally known, and could not have been concealed from our cruisers that enemy passes, to protect from capture, our vessels sailing on lawful voyages, with cargoes belonging to our citizens, or neutrals; were allowed by the laws of nations, and are not contrary to our own municipal laws. It is alleged to have been an opinion entertained by the commanders of our cruisers, both public and private, that all licenses or passes, from the enemy or its agents, were unlawful; and on this account this vessel was sent in for adjudication. The worthy and

respectable officer, who sent this vessel in, most undoubtedly pursued a conduct the least embarrassing and vexatious, when he ordered her into the port of her destination. It is therefore difficult for me to prevail on myself to give damages; as in cases in which they are not only retributive, but exemplary. Still however, the duty of courts is rigid and imperative. If the owner has suffered by the mistaken opinion of the captor, he ought to be retributed; at least so far, as to replace, or compensate any damage or loss, his vessel has sustained, by the capture and detention. Whether farther retribution shall be made, I shall leave to the judgment of the superior court; as I am given to understand an appeal will be entered; it having been, with no small reason, surmised, that I should decree restitution.

I decree restitution of the vessel, her tackle, apparel and furniture, with damages, to the extent I have stated, and costs. I cannot allow the captor his expenses, consistently with my view of the justice of the court.

RICHARD PETERS.

Feb. 26, 1813.

IN THE

DISTRICT COURT OF MASSACHUSETTS.

In the case of Asa Hooper and al. master, owner and owners and crew of the private armed brig Thorn,
v
Brig Hiram and cargo, John B. Barker, master.

Samuel G. Griffiths claimant of the vessel and 28 barrels of flour. Cornthwait & Cary and al. claimants of the cargo.

DECREE.

This vessel, laden with flour and bread, sailed from Baltimore for Lisbon, on or about the 24th September last, and on the 15th of October was captured by the Thorn, and brought into the port of Marblehead. The vessel is not entitled to a register, but is duly documented as the property of Griffiths, the claimant, by a certificate from the collector's office at Baltimore, dated June 24, 1811. Among the ship's papers delivered to the captors, there was no document specifying the owners of the cargo. The supercargo, in his examination before the commissioners at Marblehead, on the 3d of November, declares the cargo (excepting 100 barrels of bread, the master's adventure) to be the property of several

shippers at Baltimore, whose names he could not recollect, though he says he had received from them letters of instruction. The master, on his examination, November 15, declares the property to be as it is claimed, naming all the shippers, as they now appear to be evidenced, excepting one, and states that he signed bills of lading to the several shippers. The omission of the name of one of the shippers, in the master's evidence, is believed to be inadvertent, as the bills of lading were not in his possession. Four days after his examination, the supercargo delivered to the commissioners a bill of lading and invoice of the whole cargo, excepting the adventure. By those documents, Samuel G. Griffiths appears the sole shipper, and his orders to the supercargo are annexed, directing him, on his arrival at Lisbon, to dispose of the cargo, and to remit the proceeds to the shipper's correspondents in Liverpool, in England. The master also had written orders from Griffiths, the owner of the vessel, to make sale of her at Lisbon, if any advantageous offer should be made, and to remit the amount to England. By the affidavit of claim for the lading, made by the supercargo, it is stated, that only 28 barrels of flour belong to Griffiths; that the residue belongs to the other claimants in different proportions; that a separate bill of lading for the whole of the cargo as the property of Griffiths; that all the separate invoices and bills of lading, with the instructions of the res-

pective shippers, were deposited with Griffiths for safe keeping, the supercargo having first taken extracts for his guidance in relation to the disposal of the cargo; that the general bill of lading, with an invoice and letter of instructions from Griffiths, purporting the whole to be his property, were delivered to the supercargo at the time of sailing, and were on board at the time of capture. In explanation of this arrangement, it is stated, that it was thought advisable to have but few papers on board, in order to prevent embarrassment and delay, in case the vessel should be taken on her voyage, and carried into a foreign port. An objection was made to the admission of the papers delivered to the commissioners, by the supercargo, after the examination, but it was waved, and those papers were admitted by consent.

Among the papers found on board, was a license or protection, being a certified copy of a letter from Admiral Sawyer to Andrew Allen, Esq. late British consul at Boston, and an additional protection or letter of safe conduct from Mr. Allen. The vessel being found sailing with these instruments, appears to have been the cause of capture and bringing in, though other additional grounds for condemnation have been alleged and urged on the trial, particularly the destination of the proceeds of sale of vessel and cargo according to the instructions. The variance between the asserted interest in the cargo, and the papers on board, rendered further proof of property

requisite. An order was made for that purpose, after a hearing upon the papers found on board, and the preparatory examination. Exceptions were made to the testimony of the master and supercargo, in some particulars which were supposed to render further proof inadmissible. The omission to disclose the invoice, bill of lading and orders above mentioned, on the examination, is not indeed explained to entire satisfaction, especially on the part of the supercargo, to whom those papers were committed; and it must appear in a degree strange, that the supercargo should not be able, on his examination, to recollect and name the shippers, whose property was committed to his management, and of whose instructions, though not then in his possession, he had taken minutes. I notice the explanations that have been offered. The omission, as to the invoice and bill of lading, whatever may have been its character, whether voluntary or inadvertent, was speedily repaired by a delivery of the papers in question to the commissioners; and I do not find the exceptions to the evidence of such a description as to justify a peremptory conclusion against the owners, and to preclude an opportunity for further proof in support of their asserted claims. That proof has been produced, together with proof relative to the manner in which the license was procured. The evidence presented fully establishes the property to be as claimed, and supports the account given in the affidavit of claim,

by the supercargo, as to the ownership and arrangement relative to this voyage. The reason given for the simulation of papers, which corresponds with that given by the supercargo, I must admit to be real, though I must add, that the proposed advantage does not appear of sufficient importance to require such a disguise. It has had the common effect of such simulations, to perplex the inquiry and give a dubious character to the transaction. I know that to a limited extent there is an indulgence to such disguises in courts of admiralty, if the cause be explained to the satisfaction of the court, especially if intended to relieve from difficulties imposed by the restrictions of an enemy, and not originating in views to avoid or defraud the regulations of the country of the owners. The worst effect of such disguise, and it is a very serious one, is their liability to induce an adherence to papers on oath, by what has been denominated ship morality, too often widely different from that genuine morality, which is the basis of confidence and the great cement and support of social security and order.

Having permitted these claims to be verified by further proof, the real state of facts relative to the voyage, is clearly evidenced, in every material circumstance. The vessel and cargo are wholly owned by citizens of the United States, the destination was for Lisbon, and the cargo was there to be sold

on account and risque of the owners, the proceeds to be remitted to England.

The destination was a lawful one. But it is contended that the claims should be rejected and the vessel and cargo condemned to the captors. 1. On account of the British protection or license. 2. For the destination of the proceeds, or the directions relative to the remittance, which are said to be in violation of the law of war, and the allegiance of the persons concerned in the voyage. These questions are novel and important. No express authority is produced by which they can be determined. There are no statute provisions on the subject, and it has fallen to my lot to examine the principles, to trace and estimate the analogies urged or suggested as a ground of decision. This investigation has been pursued with diverted attention to other causes necessarily requiring a determination.

In regard to both the questions, it is obvious, that the considerations by which they are to be governed have reference merely, to the rights and duties of a citizen in regard to his own country in a state of war. How the transaction would be viewed by the laws of nations, if the vessel had been captured by a ship of another belligerent with whom Great Britain is at war, makes no part of the present inquiry. The license, as it is called, is composed of three papers, a copy of a letter from admiral Sawyer, dated at Halifax, August 5th, 1812. Mr. Allen's certificate an-

nexed to and authenticating the copy, dated at Boston, Sept. 15, and another certificate from the same gentleman of the same date, addressed to all officers of his Britannic majesty's ships of war, or of privateers belonging to his subjects.

It is contended that these papers stamp a hostile character on this vessel and voyage, which is insurmountable and fatal; that the American character of the vessel and adventure is forfeited by an association with enemies, and by being voluntarily placed under the protection of the enemy's armed force; and it is further contended that the possession of such license is evidence of an illegal commercial intercourse with enemies, and of enemies' interest in the concern; or of subserviency to the views of the enemy; in violation of the duties of the citizen and of his allegiance.

What shall constitute a hostile character, is sufficiently well determined in many instances, which are strongly marked. One characteristic is, the sailing under the flag and pass of the enemy. This is conclusive as to the character of the ship, and is a complete bar to the claims of an asserted neutral proprietor, (5 Rob. 13, Amer. ed.) If assumed by a subject of the capturing belligerent, it would be equally conclusive as to goods, and would be decisive against the admission of any claim. In giving judgment on a case of this description, in relating to the Dutch flag and pass, assumed by a neutral, Sir W. Scott

observes, that ships have a peculiar character impressed upon them by the special nature of their documents with which they are so invested, as to the exclusion of any claims of interest that persons living in neutral countries may actually have in them. In the same case he makes a distinction, however, between such a complete adoption of the hostile character, and a pass or license for a particular purpose, relative to the enemy's trade, without an alteration of the neutral character of the ship. The council for the claimants, in the case of the Vrow Elizabeth, cited the case of the Clarissa, in which the American owner obtained restitution of his share of the ship, though the vessel had sailed from Holland under a speeial pass or license from the authority of that country, to engage in the colonial trade. In that case, says Sir William Scott, the ship had merely a colonial pass or license, being in all other respects undoubtedly and avowedly an American ship, and described as such in the usual American documents. The distinction is applicable in the present case. The ship and cargo, which are clearly American property, are documented as such; the papers from the officers of the British government, also recognise her as such, and are merely intended to exempt the property from capture by the enemy's cruisers. The arrangement is an unusual one, and we have no express precedent by which to determine its legal operation. Exceptions from capture have sometimes

been made by belligerents from motives of humanity, as in the case of fishing vessels, and at one time when Spain was at war with Great Britain and distressed by famine, in favour of vessels bound with grain to that country. Anciently, the admiral of France had the power of forming fishing truces or of granting passports to individuals, to continue their fishing or trade unmolested. It is not contended, that a vessel taking the benefit of these indulgences would be considered as offending, though in the instance of the French passports to fishing vessels, they were occasionally given to individual vessels, and did not operate by a general order or decree. In the present case it was not competent for admiral Sawyer to give a general security against all the cruisers of his country, but he declares, that he shall give directions to the commanders of the squadron under his command, not to molest American vessels, unarmed, and laden with flour and other dry provisions *bona fide* bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of his letter under the consular seal of Mr. Allen. This is the mode adopted to notify the cruising ships of the admiral's instructions. If he had elected another method, and had published his instructions in the Gazette at *Halifax*, it surely could be no offence against the duties of a good citizen bound on a lawful voyage, to take with him one of the British newspapers, containing such instructions, as a security on

such lawful voyage, not prohibited by the laws of his country. A certified copy of the letter, by a known officer, has, as appears to me, no other legal effect or operation. Mr. Allen's Consular powers may indeed have terminated by the war, though his residence in the country was permitted, and I shall not undertake to decide on the propriety of his signing in that capacity. It was, probably, considered as a mode which would give greater security to the holders of the instrument, and render it less liable to exception or doubt from the enemy's cruisers. In this view it was rendered more valuable to the holders, and the procedure is entitled to candid consideration; at any rate, I cannot consider it as giving a vicious taint to the transaction, so as to subject the citizen receiving such a document to process of condemnation from the authorities of his country, which are to decide upon the operation of the paper. Mr. Allen aims to bestow a more extensive security than what is given by admiral Sawyer, but it is, as it necessarily must have been, merely advisory. It is addressed to the officers of all the ships of war of his country, public or private.

The views and intentions manifested by those officers in these papers, have been particularly urged in argument. It is said, that they fully express purposes favourable to the enemy, and that the acceptance of papers with such indications implies a voluntary subserviency to British interests. In what-

ever terms these papers had been drawn, no one could suppose that they were granted from mere good will to this country, and if that had been affected, it could have deceived no one. In fact, whether expressed or not, the state of things presented a case in which there was a coincidence of interests. When this trade was left open, after the declaration of war, it must have been understood, that Great Britain would feel an interest in its prosecution. This could not but have been perceived and considered, when the act of the 6th July last, relative to trading with the enemies of the United States, was passed. The subsequent relaxation of the rights of war and of capture, on the part of the enemy, relative to such trade, only presents a more decided manifestation of the estimated importance of the trade to Great Britain. It still is a legal and innocent trade to our citizens, until prohibited by statute; nor do I conceive that the expressions in the papers should subject the citizen to the imputation of intending the promotion of the views of the enemy; he has his own interest in view, and so far as any public considerations enter into the enterprize, he ought to be considered as favouring the views and interests of the country, who have left the trade open under a full contemplation of the state of the country and of the world, politically and commercially. On the face of the instruments, therefore, and viewing their whole tenor, I consider them not as conclusive against the claimants

who are the holders of them. But the relaxation is not universal, and from the very nature of partial exemptions they are liable to a degree of suspicion—though not in themselves absolutely vicious, they may become so by the manner in which they were obtained, or the conditions on which they were granted; I have, therefore, in this case and another of similar description (the schooner Hero) required further proof on this head, and the order for further proof is limited to the claimants, according to the general rule in prize cases, 3 Rob. 267. Amer. Ed.

By the proof that has been produced, relative to the license in this case, it appears to have been purchased of a citizen of the United States, an inhabitant of Virginia, at the rate of one dollar per barrel for what the vessel would carry; that part of the consideration was paid in cash, the remainder to be paid on arrival of the vessel in Lisbon: that the license was in blank, and the person procuring the license declares, on oath, his belief, that the seller had no knowledge of or concern with Mr. Allen by whom the license was issued. It is further testified that such licenses are a common article of sale in Baltimore and other places. On this evidence, I cannot conclude that any enemy interests are involved in the transaction, or that the terms on which the license was obtained, render it a vicious transaction, operating the forfeiture of the property intended to have been protected. The act of July 6th prohibits, under heavy

penalties, the receiving, accepting or taking "a license from the government of Great Britain, or any officer thereof, for leave to carry any merchandise, or send any vessel into any port or place, within the dominions of Great Britain, or to trade with such port or place." The mere receipt and acceptance of a license or security from capture, in a lawful trade to neutral countries, is not prohibited. If not procured on terms involving enemies' interests, I cannot find the rule of law, which renders the vessel and cargo liable to condemnation, in our courts; for being possessed of such an instrument of protection. I am sensible, that the practice may be liable to abuse. It is capable of being converted into an instrument of monopoly, or the practice may have political bearings of serious import. This liability to abuse renders it, as I conceive, the duty of the court to require such proof of the manner of procuring the license, and of the terms and conditions, as shall enable it to form an opinion as to the fair and legal operation of the procedure. I am not convinced, from the evidence in this case, that the transaction relative to this license will subject the property claimed to condemnation. There may be considerations relative to the practice of dubious aspect, which it belongs to the government to estimate, and to make such provisions as the public interest shall appear to require.

The other ground of objection, is the direction to

invest the proceeds of vessel and cargo in Bills of Exchange, to be remitted to England. The directions for the sale of the vessel are not absolute, it was to depend on the contingency of receiving an advantageous offer—If sold, however, the proceeds are directed to be remitted to England; some of the shippers direct the investment to be made in government bills, meaning, it is admitted, the bills of the English government. Others direct a remittance generally. As to the captain's adventure, it does not appear in what manner it was his intention to dispose of the proceeds. Now if this property was intended merely to be landed at Lisbon, and to be afterwards transhipped to the enemy's country, it would clearly be a trading with the enemy, and such intention being manifested, it would be liable to condemnation, if captured in any stage of the voyage, (the Jonge Peter 4 Rob. 65.) But I am by no means satisfied, that the orders given in this case, as to remittance of proceeds would, if executed, be of like legal operation. To produce a conclusion of such serious consequence to the owners of the property, I ought to be assured, that there would be no mode of effecting the proposed remittances without implicating the claimants in the culpability of trade with the enemy. Now it is observable, that all the cases, and they are numerous, which have been cited from the books, respecting trade with the enemy, relate to tangible objects, capable of actual use for the purposes of life i. e. to goods and merchandise bound to or from the

enemy's country. Of this description are all the instances cited in the case of *The Hoop*, (1 Rob. 165 Am. Ed.) in which the law on this subject is so fully displayed and illustrated. I do not mean to infer, that other transactions would not constitute a trade with an enemy. It certainly may be committed by going to or coming from an enemy's country with a vessel without a cargo. But no case has been produced, though the attention of the able and learned counsel for the captors was specially directed to the inquiry in which the usual operations of exchange were considered as of this character. In fact, by an analysis of those operations, it will appear, that a substantial difference exists, in regard to aid an enemy between a trade in commodities, and what is called a remittance. If a citizen should convey commodities to an enemy's country, he affords him palpable aid, and the act is illegal. But if he should purchase of a fellow citizen, or of a neutral, a debt or demand against a subject of the enemy country, he renders no benefit to the enemy, there is only a change of the creditor. If the remittance be to pay a debt, the enemy country is indeed a gainer to the amount of the debt. How a remittance for such a purpose in time of war should be considered, it is not necessary here to inquire. The remittances in this case were specially intended as a deposit, until there should be an opportunity to withdraw the amount.

It is decided that a subject of one belligerent may

lawfully purchase of a neutral, goods, or vessels, lying in a port of the opposing belligerent. The trade, in such case, is with the neutral, and the locality of the objects purchased does not vitiate the transaction (4 Rob. 233. Am. Ed. Chitty Law of Nations, 15.) From this authority I should infer, that the supercargo, on this voyage, might lawfully purchase of a subject of Portugal, his debt or demand on England, or in other words his bill of exchange on England. But it is observed, that according to the direction of some of the shippers, the investment was to be made in government bills. Such an investment, it is urged, would be particularly noxious, having a tendency to sustain the credit and give additional value to the enemy's paper. So far as such direction may be evidence of an intent of a commercial dealing relative to this cargo or any portion of it with subjects of the enemy it is pertinent. But I do not consider it warrantable for me to make that inference, without more direct evidence. Government bills, as they are termed, it is affirmed, and I presume the fact is so, are in the market, bought and sold like other articles. A *bona fide* purchase of an English bill, of a neutral, would not place the party, on legal ground, in a different situation from the purchase of the bill of an individual. It would be otherwise, if the neutral were the mere agent, to procure such government bills from the British holder.

It cannot be denied that investments in government bills, would have a tendency to enhance the va-

lue of those bills in the market. This indirect effect, however, of the operation, would not as appears to me, render it criminal. By the law of war, we are not to benefit an enemy; on the contrary, according to Bynkershock, *vetatur quoquo modo hostium utilitati consulere.* We are not to consult the benefit of the enemy, and of course that trade and those operations are, by the law of war, illegal, which from their character, imply such a motive. But such is the connexion of human affairs, which national conflicts cannot altogether dissolve, that many operations may have an indirect effect to benefit the enemy, and yet the law of war has not considered them, embraced within its maxims of prohibition. If, for instance, the proceeds of the numerous shipments to Spain and Portugal from this country should be invested in British goods, it would undoubtedly aid the enemy, by the encouragement given to its manufactures, and in a degree, to its commerce. Still such purchases would be lawful to our citizens, if made *bona fide* of a neutral owner, such goods, thus purchased, might be lawfully transported to any other neutral country. The mere law of war, indeed would not prohibit the importation of goods, so purchased, even to our own country. It is our law of non-importation, made before the war, which has this operation.

If such investment be not illegal, I am not satisfied, that evidence of the debt, thus purchased of a neutral, might not be transmitted from the neutral coun-

try, without coming within the legal idea of trade with an enemy, as developed and illustrated by the cases which have been decided. It was, for a long time, lawful in England to insure enemies' property, and such was the common practice in that country in former wars with France. Valin, in language, as Marshall observes, bordering a little on derision, remarks on the impolicy of such a rule of law, which was peculiar to England, and suggests the benefit derived from it by France. But we find no intimation, that the procurement of such insurance in England, by a subject of France, was illegal, nor is it made subject to any animadversion; and yet such insurance could not have been effected without a correspondence. So when in England, in the modern trials upon policies of this description, the foreign holder of the policy has been held not entitled to recover, the objection has not been made, even in argument; that the creation of the policy, which would necessarily involve a degree of communication with the enemy, was an act of trading; but that the object and effect of such policy was to protect the trade of the enemy. If, therefore, it were now lawful in England to insure enemies' property, it would not, as appears to me, come within the idea of trade with the enemy, for a citizen of this country to procure such insurance, though it could not be accomplished without a communication direct or indirect with that country. The same reason would apply to the mere transmission of the evidence of a debt

or demand on an enemies' country, lawfully acquired.

I acknowledge the general obligation, of bringing every correspondence with the enemy, under the cognizance of government. A correspondence, intrinsically innocent, may be culpable from a non-conformity with regulations, calculated to assure the government, that nothing injurious is to be apprehended from any proposed communication. It would be reasonable, however, to expect a promulgation of such regulations, that every one might be secure from dangerous inadvertence. Besides, as the government has a public agent in Lisbon, and the charge in this case rests on intention, I ought not to conclude, that any correspondence, which the proposed remittance of bills to be purchased might require, would not be submitted to his inspection.

In speaking of the doctrine of insurance on enemies' property, as it formerly stood, I cannot omit to notice its application to the first objection in this case, grounded on the license from an enemy. The reasons which have led the courts of law in Great Britain, ultimately, to decide against the validity of such insurances, after long practice to the contrary, might cause that country to be dissatisfied with these indulgences granted by its officers; and for the reasons which induced France not to discountenance or disapprove of the procurement of insurances in England, in time of war, between the two countries; may we conclude, as to the innocence of obtaining

these licenses or protections, if tainted with no improper contract or conditions.

Such are the views which I have taken on this subject. In contemplating the questions on which the cause depends, and in searching for just inferences from acknowledged principles, and from analagous determinations, I should not be surprised if my conclusions should be found erroneous, in which case they will be corrected by a superior tribunal, if the captors should be dissatisfied. I decree restitution to the claimants; but I do not think the captors should sustain the costs of bringing the case to adjudication, especially as further proof was requisite, and the obvious facts might induce the course pursued by the captors, consistently with sincere and honest conviction, that their procedure was justifiable. I therefore direct the payment of their necessary expenses.

JOHN DAVIS,
Judge of the District Court.

February 6, 1813.

Note. In the case of the Aurora, an American vessel condemned by Judge Howell in the District Court of Rhode Island, for having a *Sawyer-License* on board; it appeared that the vessel, which was bound to St. Barts, had a certificate from Andrew Allen, Esq. late British consul, stating, "that the voyage was intended to answer the views of the admiral's license, viz. a supply of the British West Indies. And it is understood, that, on the ground of a *British supply being intended*, and proceeded in, the condemnation took place.

EDITOR.

THE LICENSE.

His majesty's ship Centurion,
at Halifax, the 5th August, 1812.

Sir,

I have fully considered that part of your letter of the 18th ult. which relates to the means of insuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, and being aware of the importance of the subject, concur in the proposition you have made. I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels unarmed and so laden, *bona fide* bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under your consular seal.

I have the honour to be, Sir,
Your most obedient
Humble servant,
H. SAWYER, Vice Admiral.

ANDREW ALLEN, British Consul, Boston.

(Stamp. Arms of the British king.)

Office of his Britannic majesty's consul.

I, Andrew Allen, Jr. his Britannic majesty's consul, for the states of Massachusetts, New-Hampshire,

Rhode Island, and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed to me by Herbert Sawyer, Esq. vice admiral and commander in chief on the Halifax station.

Given under my hand and seal of office, at Boston in the state of Massachusetts, this fifteenth day of September, in the year of our Lord, one thousand eight hundred and twelve.

(Signed) ANDREW ALLEN, Jr.
(Consular Seal.)

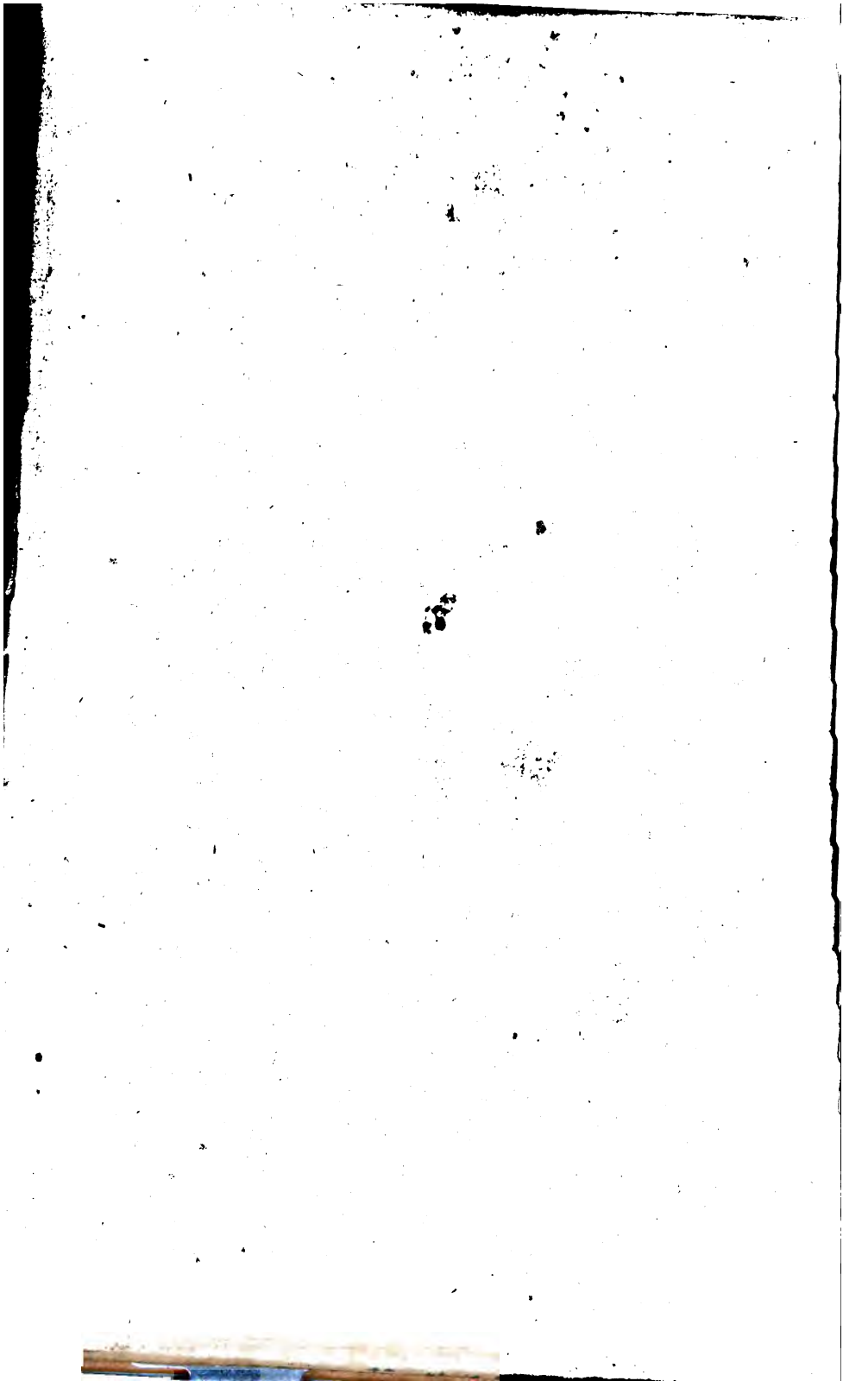
To all officers of his majesty's ships of war or of privateers belonging to subjects of his majesty.

Whereas, from a consideration of the vital importance of continuing a full and regular supply of flour and other dry provisions to the ports of Spain and Portugal or their colonies, it has been deemed expedient by his majesty's government, that notwithstanding the hostilities now existing between his majesty's government and these United States, every degree of protection and encouragement should be given to American vessels laden with flour and other dry provisions and bound to the ports of Spain and Portugal or their colonies; and whereas in furtherance of these views of his majesty's government, Herbert Sawyer, Esq. Vice Admiral and comman-

der in chief on the Halifax station, has directed to me a letter under the date of the 5th August, 1812, (a copy of which is herewith enclosed) wherein I am instructed to furnish to American vessels so ladened and destined, a copy of his letter, certified under my consular seal, which documents are intended to serve as a perfect safe-guard and protection to such vessel in the prosecution of her voyage. Now, therefore, in prosecution of these instructions, I have granted to the American brig called the Hiram, of 219 tons burden, whereof John B. Barker, is master, now lying in the port of Baltimore, and ladened with flour and bread, bound *bona fide* to the port of Lisbon, a copy of the said letter of Vice Admiral Sawyer, certified under my consular seal—hereby requesting all officers of his majesty's ships of war or of private armed vessels belonging to subjects of his majesty, not only to offer no molestation to the said vessel, but on the contrary, to grant her all proper assistance and protection in her passage to Lisbon, and on her return from thence to her port of her original departure, whether laden with salt, or in ballast only.

Given under my hand and seal of office, this 15th day of September, in the year of our Lord one thousand eight hundred and twelve.

(Seal.) ANDREW ALLEN, Jun.
His majesty's consul.



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